BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MATTHEW W. FOX	)	
Claimant	)	
VS.	)	
	)	Docket No. 173,869
PRAYTOR CONSTRUCTION	)	
Respondent	)	
AND	)	
	)	
AETNA CASUALTY & SURETY	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the post-award Order Denying Medical Treatment dated January 29, 1997, and Order Nunc Pro Tunc dated February 3, 1997, both entered by Administrative Law Judge Kenneth S. Johnson. The Appeals Board heard oral argument on June 4, 1997.

APPEARANCES

Kent Roth of Great Bend, Kansas, appeared for the claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board is the transcript of hearing held before Administrative Law Judge Kenneth S. Johnson on January 8, 1997. For purposes of claimant's request now before us, the parties did not enter into stipulations.

ISSUES

The Administrative Law Judge denied claimant's post-award request for additional medical treatment and attorney fees. Claimant requested the Appeals Board to review that denial. The only issues raised by parties on this review are:

(1) Is claimant entitled to additional medical care and treatment?

(2) Is claimant entitled to an award of attorney fees?

(3) Is claimant entitled to an award of penalties pursuant to K.S.A. 1991 Supp. 44-512a?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Order Denying Medical Treatment should be affirmed.

(1) Is claimant entitled to additional medical care and treatment?

Claimant injured his back in May 1992 and ultimately underwent low back surgery. Claimant was released from medical treatment by his orthopedic surgeon, Stephen Ozanne, M.D., in February 1995, but instructed to return as needed. Claimant attempted to seek additional treatment for his back from Dr. Ozanne in 1995, but the insurance carrier refused authorization. Dr. Ozanne's office then instructed claimant to seek treatment from his family physician.

In March 1996, claimant consulted his family doctor, Ronald N. Whitmer, D.O., at the Ellsworth Clinic for sharp back pains which he experienced after bending at home to pick up toys. In July 1996, claimant returned to the Ellsworth Clinic with increased back complaints and pain into the left hip and leg. The Clinic's notes for a visit on July 18, 1996, read as follows:

> "Matthew Fox is here complaining of left lumbar and buttock pain. He has been doing an awful lot of work at home remodeling his house, helping out a friend with some heavy manual work. He is self-employed and is also very active, doing lifting, etc.
>
> "He had a significant back injury in 1993 and had back surgery in 1994. The pain at that time was on the right side. He was told that he had another disc that was degenerating at that time.
>
> "He denies weight loss, fever, sweats. His back began hurting him, approximately a month ago and has been progressively worse. . . .
>
> "ASSESSMENT: Recurrent back strain, he is doing inappropriate physical labor. He was counseled about this."

Claimant's family doctor referred him back to his orthopedic surgeon. Because Dr. Ozanne had left his former clinic, claimant saw another orthopedic surgeon, Kris Lewonowski, M.D. Although Dr. Lewonowski did not testify, the doctor provided a letter dated December 22, 1996, which was entered into evidence without objection, in which the doctor stated:

> "In response to your letter dated December 12, 1996, you asked whether the treatment that we recommended to this patient relates to his primary problem or to any specific aggravations since that time. In review of Mr. Fox's records and from seeing him, I understand he did have a hemilaminectomy and diskectomy of L5-S1 performed in 1994. After the surgery, the patient did feel better, and his right leg pain did cease. However, since May his pain has gotten worse. There has been no particular trauma or injury to trigger this pain. Review of MRI on November 25, 1996, notes postlaminectomy changes at L5-S1with an extensive posterolateral disc herniation to the left side at this level, which has progressed since imaging studies in 1992. There is also a mild posterior disc herniation at L4-5, centrally, which has also progressed since 1992. These findings were present on his 1992 scan and have progressed since that time. In spite of the fact that he has had hemilaminotomy, diskectomy, he has most likely reherniated at the same level, and I would submit that these problems relate to his original injury in May of 1992, from which he is yet to recover completely."

Before claimant is entitled to additional medical care and treatment, he must prove the requested treatment is needed as a result of the May 1992 accident or the natural consequences of that accident. The Appeals Board finds the medical expense, including the medical mileage, incurred for treatment of claimant's back complaints in 1995 should be the responsibility of the respondent and its insurance carrier as those expenses appear directly related to treatment of ongoing symptoms from the May 1992 accident. However, the Appeals Board finds claimant has failed to prove the medical expense incurred on or after March 15, 1996, is the result of the May 1992 accident or a natural consequence of that accident. Therefore, the medical expense incurred on and after March 15, 1996, is not the respondent's and insurance carrier's responsibility.

The Appeals Board finds Dr. Lewonowski's opinion, quoted above, does not establish the necessary direct relationship between claimant's need for medical treatment beginning in March 1996 and the May 1992 accident. The doctor's statement that claimant's problems "relate" to the original injury is not the equivalent to claimant's condition being the natural consequence of the initial work-related accident. The doctor does not state or identify what the relationship might be between claimant's present problems and the original accident. Unfortunately, the doctor's statement could have many meanings.

Although Kansas recognizes the doctrine that every natural and direct consequence that flows from a work-related injury is compensable, the doctrine is not applicable when the consequence results from a new and separate accident. *See* Wietharn v. Safeway Stores, Inc., 16 Kan App. 2d 188, 820 P.2d 719 (1991). Based upon the description of claimant's activities as shown in the Clinic records, the Appeals Board is unconvinced claimant's flare up of back symptoms in March and July 1996 is the direct and natural consequence of the May 1992 work-related accident rather than a new and separate accident.

Further, Dr. Lewonowski's opinions must be considered in light of the medical history contained in the Ellsworth Clinic's records quoted above. The evidentiary record does not indicate whether Dr. Lewonowski considered claimant's activities leading up to his increased symptoms in March and July 1996. Therefore, it is unknown and questionable whether Dr. Lewonowski's opinions are based upon all the pertinent facts.

It is well settled that claimant bears the burden to prove all elements of his claim. Because the evidence fails to prove the relationship between the May 1992 work-related accident and the medical treatment incurred during and after March 1996, the Appeals Board finds claimant's request for medical treatment for that period should be denied.

(2) Is claimant entitled to an award for attorney fees?

The Appeals Board finds this is a post-award proceeding to request additional medical treatment. K.S.A. 1991 Supp. 44-536(g) provides in pertinent part:

> "In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for vocational rehabilitation, a hearing for additional medical benefits, or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis."

After considering the nature of claimant's request, the legal services provided, and the time claimant's attorney expended in this post-award matter, and after considering both parties statements and arguments concerning the reasonableness of the fee request, the Appeals Board finds a reasonable fee in this instance for claimant's attorney is $750.

(3) Is claimant entitled to penalties for nonpayment of past due medical expense pursuant to K.S.A. 1991 Supp. 44-512a?

At the January 8, 1997, hearing before the Administrative Law Judge, claimant did not address the issue of penalties. Instead, the parties represented to the Administrative Law Judge that the hearing was a post-award motion for medical treatment. The only mention of the penalty statute, K.S.A. 1991 Supp. 44-512a, is found on page four of the hearing transcript where claimant's counsel asked for medical expense to be paid under that statute. In closing arguments neither attorney mentioned penalties and claimant's attorney requested only medical authorization and attorney fees. Apparently not aware that penalities were an issue, the Administrative Law Judge in the Order Denying Medical Treatment likewise did not address claimant's entitlement to penalities.

The Appeals Board finds claimant did not present the penalties issue to the Administrative Law Judge and, therefore, finds the penalities issue was abandoned. Therefore, the Appeals Board will not address that issue at this time. *See* K.S.A. 1996 Supp. 44-555c where Appeals Board review is restricted to those questions and issues first presented to the administrative law judge.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the respondent and its insurance carrier are ordered to pay the reasonable and necessary medical expenses, including medical mileage, incurred by claimant between February 3, 1995, and March 1996 for treatment of his low back injury; claimant's request for payment of medical expense incurred during and after March 1996 is denied; claimant's request for authorization for ongoing medical treatment is also denied; claimant's request for post-award attorney fees is granted and respondent and its insurance carrier are ordered to pay claimant's attorney the sum of $750; and claimant's request for penalties is denied.

IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kent Roth, Great Bend, KS
Edward D. Heath, Jr., Wichita, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director